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**Comptroller General
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Decision

Matter of: Raydar & Associates, Inc.

File: B-401447

Date: September 1, 2009

S. Andrew Burns, Esq., and Bruce A. Walker, Esq., Cox Sargeant & Burns, PC, for the protester.

William L. Walsh, Jr., Esq., J. Scott Hommer, III, Esq., Patrick R. Quigley, Esq., and Justin J. Wortman, Esq., Venable LLP, for Tri Star Engineering, Inc., the intervenor.
Marvin D. Rampey, Esq., Naval Sea Systems Command, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's assertion that awardee, the incumbent contractor, had improper organizational conflict of interest due to involvement in providing level of effort information for incorporation in solicitation is untimely where record shows that (1) protester was aware of awardee's involvement, (2) protester brought its concerns to agency's attention, (3) agency responded that awardee's involvement was not improper, and (4) protester did not challenge agency's failure to preclude awardee from competing prior to closing time for receipt of proposals.

2. Protester's allegation of agency bias in favor of awardee is denied where record, including agency's un rebutted responses denying bias, contains no evidence of bias or bad faith on part of agency personnel.

DECISION

Raydar & Associates, Inc., of Odon, Indiana, protests the award of a contract to Tri Star Engineering, Inc., of Bedford, Indiana, under request for proposals (RFP) No. N00164-08-R-GR40, issued by the Department of the Navy, Naval Surface Warfare Center, Crane Division (NSWC Crane), for maintenance and repair services for various military radar antennas. Raydar principally argues that Tri Star had an improper organizational conflict of interest (OCI), and that the evaluation of its own proposed key personnel was unreasonable.

We deny the protest.

The solicitation, issued on October 16, 2008, contemplated the award of a 5-year indefinite-delivery/indefinite-quantity contract, under which the agency intends to issue cost-plus-fixed-fee and fixed-price delivery orders. RFP at 2-9, 32, and 71. Award was to be made to the firm whose offer was evaluated as the “best value” to the government, considering: 1) technical capability (with subfactors for personnel qualifications/resumés, facility plan, and subcontracting/teaming arrangement), 2) past performance, 3) management plan and corporate capability (with sub-factor for management plan and corporate capability), and 4) price. RFP at 69-70.

The agency received proposals from Tri Star, the incumbent contractor, and from Raydar, Tri Star’s current subcontractor. Raydar’s proposal was rated marginal, high-risk overall, with a rating of marginal under the personnel qualifications/resumés subfactor. Tri Star’s proposal was rated excellent, low-risk overall, with a rating of excellent under the personnel qualifications/resumés subfactor. Agency Report (AR), attach. D, Consensus Rating Summary Table and Source Selection Report, at 1. Award was made to Tri Star on May 8, and Raydar was notified of the award on May 11. AR, attach. E, Notice of Award, at 1-2. The agency provided Raydar a detailed written debriefing, including specific strengths and deficiencies identified for each of Raydar’s proposed key personnel. AR, attach. G, Raydar Debriefing, at 3-4.

OCI

Raydar alleges that Tri Star had an improper OCI, and that the award therefore was improper, because a Tri Star employee assisted in drafting portions of the RFP. Raydar contends that the awardee “was directly involved in the collection of data to compile contract/solicitation estimates,” Protest at 1-2, and that this involvement provided Tri Star with an inequitable “home court advantage.” Protester Comments at 2. In this regard, the Federal Acquisition Regulation (FAR) generally requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR §§ 9.501, 9.504, 9.505.

The agency acknowledges that a Tri Star employee provided information regarding Tri Star’s level of effort in performing the previous contract. AR at 1, 8. The agency reports, however, that the employee executed a non-disclosure agreement and did not have access to proprietary or competition-sensitive information, and that the information provided by the employee was incorporated into the solicitation. AR at 1; RFP at 3, 66.¹

¹ Similarly, a Raydar employee completed the contract data requirements list, identifying the deliverables, such as progress, status and management reports, that the contractor is to provide under the contract. AR at 1. This list was also included (continued...)

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals must be filed prior to that time 4 C.F.R. § 21.2(a)(1) (2009). The record shows that the protester was aware of Tri Star's employee's involvement with the preparation of the solicitation as early as February 26, 2008. In this regard, in an e-mail exchange with the agency on that date, Raydar stated that it is "a bit uncomfortable" with Tri Star's involvement "in the casting of the new contract offerings," Protester Comments, exh. 1, E-Mail between Raydar and NSWC Crane, at 2, and the agency responded the same day that Tri Star's employee was only "data collecting" to help the agency compile contract estimates and would not have any role in source selection or have any influence on contract award. Id. at 1. There is no evidence of any further objection by Raydar.

As a general rule, a protester is not required to protest that another firm has an impermissible OCI until after that firm has been selected for award. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. A different rule applies, however, where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the protester has been advised by the agency that it considers the potential offeror eligible for award. Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6-7; Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2. In such cases, the protester cannot wait until an award has been made to file its protest of an impermissible OCI, but instead must protest before the closing time for receipt of proposals. Honeywell Tech. Solutions, Inc., supra.

Here, Raydar's concerns that a specific Tri Star employee was involved in the preparation of the solicitation arose prior to the RFP's closing date. Further, it is clear that Raydar was aware that Tri Star was likely to compete, and that the agency did not consider Tri Star to have an OCI that precluded it from receiving the award. Under these circumstances, Raydar's protest is untimely because it was not filed prior to the closing time for receipt of proposals. Honeywell Tech. Solutions, Inc., supra, at 7.

In any event, the record does not support Raydar's claim that Tri Star had an OCI or that Tri Star gained a competitive advantage. While Raydar claims that Tri Star "was in a position to influence or otherwise tailor" the RFP to meet its particular strengths, Protester Comments at 2, it does not allege any specific facts showing that an OCI exists. The record shows that Tri Star did not participate in the preparation

(...continued)

in the solicitation at pages 102-05. Id. Raydar's employee also executed a non-disclosure agreement, and was not given access to proprietary or competition-sensitive information. Id.

of the specifications or the statement of work, and that the Tri Star employee's efforts were limited to collecting data regarding Tri Star's own level of effort under Tri Star's current contract. Raydar does not explain how Tri Star's involvement in this manner could have created a competitive advantage, and no actual or potential advantage is otherwise apparent to us. Further, all of the level of effort information was provided to Raydar and other potential offerors in the solicitation. We conclude that there is no basis to find that Tri Star had an OCI or an unfair advantage in the procurement.

KEY PERSONNEL EVALUATION

Raydar challenges the agency's evaluation of its proposed key personnel. Noting that the agency stated during its debriefing that its key personnel were found to be "unqualified to perform tasking," Raydar asserted in its protest that "All proposed key personnel offered by the Protester are either currently performing the tasking specified within the solicitation or have performed effectively in the proposed capacity within the past three (3) years" Protest at 2. The agency responded in its report by explaining the basis for downgrading each employee. AR at 16-17. In its subsequent comments on the report, Raydar for the first time provided specific assertions as to how the agency's evaluation was improper regarding specific employees. Protester Comments at 3-7.

As noted above, protests based on other than solicitation improprieties must be filed within 10 calendar days after the protester knew or should have known it bases of protest. 4 C.F.R. § 21.2(a)(2). Further, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 9. In this regard, where a protester raises a general argument in its initial submission, but fails to provide details within its knowledge until later, so that a further response from the agency would be needed in order for us to adequately review the matter, these later, more specific arguments and issues will not be considered unless they independently satisfy the timeliness requirements under our Regulations. Planning and Dev. Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11. We have found supplemental protest grounds untimely where they consist of "examples" of flaws in an agency's evaluation generally alleged in the initial protest; such a staggered presentation of issues, each of which involves different factual circumstances and requires a separate explanation from the agency, constitutes precisely the type of piecemeal presentation of issues that our timeliness rules do not permit. Id.

The record shows that Raydar was advised of the personnel weaknesses identified by the agency as early as the agency's written debriefing. AR, attach. G, Raydar Debriefing, at 3-4. Nonetheless, the detailed comments purporting to support

Raydar's earlier broad allegation were not filed until July 15, that is, 6 weeks after the protest was filed. Since Raydar did not raise its challenge to the evaluation of its proposed key personnel with the requisite degree of specificity until it filed its comments, weeks after learning the basis for the challenge, it is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2); Eisenhower Real Estate Holdings, LLC, B-310941, Mar. 18, 2008, 2008 CPD ¶ 69 at 5-6.

Throughout the development of the protest, and in its comments on the agency report, Raydar has characterized its original protest as also asserting that it and Tri Star proposed some of the same personnel, and that these personnel were evaluated differently under the two proposals. Protester Request for Additional Documents, at 1-2; Protester Comments at 2-3. We do not agree that this argument was raised in Raydar's initial protest. Beyond the language cited above regarding the personnel evaluation, Raydar's protest stated only that its "personnel assets are so valued that the Competitor has been actively recruiting the Protester's key personnel before, during, and after the open bid period." Protest at 2. The protest makes no reference whatsoever to the possibility that identical personnel proposed by both contractors were evaluated differently. See Theisinger und Probst Bauunternehmung GmbH, B-275756, Mar. 25, 1997, 97-1 CPD ¶ 168 at 8 n.4.

BIAS

Raydar asserts that the agency exhibited bias in favor of Tri Star. Specifically, the protester complains that the agency provided Tri Star access to government space, enabling Tri Star to gather space and equipment requirements data, offered Tri Star an opportunity to lease agency space, and delayed the award to provide Tri Star an opportunity "to amend some portion" of its proposal. Protest at 2.

Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition. Leader Communications Inc., B-298734, B-298734.2, Dec. 7, 2006, 2006 CPD ¶ 192 at 9; McDonnell-Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 28. Raydar has not sufficiently supported its allegations.

Regarding access to government space, while the agency confirms that Tri Star did have access to space, it explains that this was by virtue of its status as the incumbent contractor, and was not provided for purposes of this procurement. The agency further explains that, as the incumbent subcontractor, Raydar had similar access to Navy property. AR at 9. The agency reports that Tri Star never submitted a request to the contracting officer for access to Navy space for the purpose of gathering physical space and equipment requirements data. *Id.* Regarding Raydar's assertion that Tri Star was allowed to propose the use of government space, thereby creating a "favorable cost position," Protest at 2, the agency responds that it is not aware of any NSWC Crane facilities that have been leased to Tri Star or to any of its subcontractors. AR at 12. Finally, while the agency concedes that the award was

delayed, it states that this was “due to personnel reassignments within the Contracting Office and the fact that evaluations of the cost proposals required more time than expected because of the number of subcontractors included with the offers.” Id. The agency states that “no amendments to the offers were requested or allowed.” Id. Given the agency’s reasonable explanations in response to Raydar’s assertions, we conclude that there is no basis to find bias or bad faith on the part of the agency.²

Raydar argues that its debriefing was inadequate and otherwise flawed. We will not consider this argument; the adequacy and conduct of a debriefing is a procedural matter that does not involve the validity of the award.³ Healthcare Tech. Solutions Int’l, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5.

The protest is denied.

Daniel I. Gordon
Acting General Counsel

² As with its other arguments, Raydar’s initial protest included only general, speculative allegations of agency favoritism. In response to the agency report, which addressed those general allegations, the protester submitted details purporting to support its broad allegations. It is clear from the submissions, however, that Raydar knew or should have know the detailed factual information supporting its general assertion before it filed its protest. We will not consider Raydar’s later-raised arguments, since these more specific arguments do not independently satisfy our timeliness requirements. Planning and Dev. Collaborative Int’l, supra.

³ In its comments in response to the agency report, Raydar for the first time asserts that Tri Star’s subcontractor will not be providing any services under the contract and that Tri Star therefore will not have sufficient space on or near the base to perform the contract; that the agency failed to adequately document its best value determination, and that the agency failed to “give meaningful consideration to cost or price” in its award determination. Protester Comments at 8-9. These arguments are untimely. The agency report apparently was the source of the information on which these arguments are based and, due to a time extension, Raydar’s comments containing these arguments were filed more than 10 days after Raydar received the report. The extension of the time period for filing comments did not serve to extend the time period for filing new protest grounds. See Exelon Servs. Fed. Group, B-291934, Apr. 23, 2003, 2003 CPD ¶ 86 at 7 n.4.